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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MARC E. and APRIL
L. LEBLANC.

MARC E. LEBLANC,

Appellant,

v.

APRIL L. LEBLANC,

Appellant.

E046027

(Super.Ct.No. IND063212)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. Michael McCoy,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part; reversed in
part.

Best Best & Krieger, Kira L. Klatchko and Douglas S. Phillips for Appellant Marc
E. LeBlanc.

Schlecht, Shevlin & Shoenberger and Jon A. Shoenberger for Appellant April L.
LeBlanc.

This case involves appeals in a marital dissolution proceeding from two postjudgment orders. One order grants the application of Marc LeBlanc to reduce his agreed-upon monthly child support obligation because he had sold his dental practices and his monthly income had been reduced to half of what it had been when he and April LeBlanc entered into a marital settlement agreement pursuant to which he had agreed to pay more support than required under the state child support guidelines. The other order grants April's¹ motion to recover the profit Marc made on the sale of his dental practices because Marc did not disclose the transactions, or their affect on his monthly income, even though Marc entered into both transactions before the final marital settlement agreement was signed and the judgment was entered. Marc appeals from the latter order and also challenges the trial court's related order awarding attorneys' fees to April in connection with her motion. April appeals from the order modifying Marc's monthly child support payments.

We conclude, for reasons we explain below, that the trial court correctly granted April's motion, but the attorneys' fees award is not supported by substantial evidence. We further conclude that in reducing Marc's monthly child support obligation the trial court incorrectly considered Marc's reduced income.

¹ We refer to the parties by their given names for the sake of clarity only; we intend no disrespect. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 280, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are undisputed. In February 2000, Marc filed a petition for dissolution of his marriage to April. The couple had two children and had separated in November 1999 after 14 years of marriage. The marriage was terminated in March 2001 and the remaining issues regarding support, custody, visitation, and property division were bifurcated from the status issue. On April 22, 2004, the trial court signed a judgment on reserved issues, which consisted of the two-page Judicial Council form judgment in dissolution proceedings, and incorporated a 35-page marital settlement agreement (MSA) signed by Marc, April, and their respective attorneys in March 2004.² The MSA provided in pertinent part that Marc's two dental practices in Indio and Palm Desert would be his separate property while the family residence would be April's separate property; Marc would assume all debts on his dental practices; Marc would make an equalizing payment to April of \$100,000; and Marc would pay child support to April of \$2,400, an amount the parties expressly acknowledged was "above guideline."

In September 2006, Marc filed an application to reduce his monthly child support obligation because his income had decreased while April's had increased during the intervening two years. Specifically, Marc asserted in his declaration that, "At the time the judgment was entered in April 2004, and the calculation of income for purposes of

² In January 2004, Marc submitted a judgment in similar, if not actually identical, form but for reasons not disclosed in the record or explained by the parties in their respective briefs, that filing was only "received" in the trial court, and was never signed by the judge.

child support was stated, [in] paragraph 13.1 [of the MSA], [his] income was between \$21,000.00 and \$25,000.00 per month. Subsequent to the entry of the judgment [his] income from the practice was reduced to \$12,250.00 per month, as a result of the sale of his professional practice and his current job status as working for Portola Dental, LLC., a professional practice, in which [he] has no interest.” In connection with Marc’s application to reduce his monthly child support payment, April took Marc’s deposition and for the first time learned that on December 15, 2003, Marc entered into an agreement to sell his dental practices for \$450,977, and the transfers occurred on January 1, 2004.

Because the transactions occurred before the MSA had been signed and the judgment entered, April filed a motion under Family Code section 2556³ to adjudicate what April asserted was an omitted asset, namely the contracts to sell the dental practices and the proceeds of those sales. In her declaration in support of that motion April stated that Marc had concealed the fact that he had sold his dental practices in December 2003, which was about three months before the parties signed the MSA. April asserted in her motion that she was entitled to the proceeds of the sale because Marc violated his

³ All further statutory references are to the Family Code unless otherwise indicated. Section 2556 provides in pertinent part that the court in a dissolution proceeding “has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. In these cases, the court shall equally divide the omitted or unadjudicated community asset or liability, unless the court finds upon good cause shown that the interests of justice require an unequal division of the asset or liability.”

fiduciary duty by failing to disclose the sale; the sale violated the automatic temporary restraining order imposed under section 2040, subdivision (a)(2); Marc falsely represented in his final financial disclosure statement dated December 23, 2003, that he owned the dental practices, which Marc falsely valued at \$390,000 with \$48,000 in encumbrances for a net value of \$342,000; and Marc did not mention his sale of the dental practices or his receipt of the proceeds from that sale while negotiating the MSA with April.

In his opposition, Marc submitted a declaration in which he stated in pertinent part that in the course of mediation with a retired judge in the summer of 2003, he and April reached what Marc believed was a final settlement on all reserved issues. As a result of that settlement, Marc believed “there was nothing more to do” other than have the attorneys put the agreement in writing. In Marc’s view he and April had agreed to the values of the various assets and as a result he was obligated to make an equalizing payment of \$100,000 to April. Marc believed that as long as he made the equalizing payment, he was free to do whatever he wished with the dental practices because the parties had agreed to value Marc’s dental practices at the time of separation, and therefore April was not entitled to any post-separation appreciation. Marc stated that he had not intended to hide anything from April and he had listed the assets in his financial declaration in accordance with the terms agreed on in mediation.

After taking the issue under submission, the trial court agreed with April that Marc had violated his fiduciary duty and did so under circumstances that entitled April to

recover all profit from the transaction, which the trial court determined was \$108,977, an amount that represented the difference between Marc's equity in the dental practices as listed in his final financial disclosure declaration (\$342,000) and the equity he received from the sale of the dental practices (\$450,977). The trial court also awarded April attorneys' fees and costs of \$15,000. Marc appeals from that order.

The trial court also granted Marc's request to reduce his monthly child support obligation from \$2,400 as agreed upon in the MSA to \$1,430.⁴ The trial court used Marc's monthly income after the previously undisclosed sale of his dental practices to calculate Marc's child support obligations under the uniform guidelines. April appeals from that order.

DISCUSSION

1.

MARC'S APPEAL

We first address Marc's appeal from the trial court's order awarding April \$108,977 plus attorneys' fees of \$15,000 on her motion. Marc contends that the award is not supported by substantial evidence because the parties stipulated that Marc's dental practices would be valued as of the date of separation. Therefore, he argues that any post-separation change in value is irrelevant. In addition, Marc contends that the trial

⁴ Because the trial court made the reduced child support award retroactive to October 1, 2006, Marc had overpaid April \$8,730 in child support. In response to April's request for clarification, the trial court ordered that \$8,730 be credited against Marc's obligation to pay April the proceeds from the sale of his dental practice.

court abused its discretion by awarding April all the post-separation equity because the trial court did not consider Marc's separate property contribution to paying down the note on the Indio practice. Finally, Marc contends that the trial court abused its discretion in awarding April attorneys' fees of \$15,000 because the award is not based on a lodestar calculation and is not reasonably related to the amount April claimed for attorneys' fees.

A. Substantial Evidence Issue

In ruling on April's motion to adjudicate an omitted asset, the trial court found that Marc did not disclose to April the negotiations or the actual sale of his dental practices; Marc sold his dental practices on December 15, 2003, with the transfer effective on January 1, 2004; the sale price of the Indio office was "\$200,000 less encumbrances of \$49,023 resulting in a net equity of \$150,977. The equity was to be paid over thirty years at the rate of \$721 per month including interest at the rate of 4%"; the sale price of the Palm Desert office was "\$300,000, payable at the rate of \$1,432 per month, including interest at the rate of 4%"; total equity from the sale of both offices was \$450,977; Marc concealed the sale of his dental practices from April; Marc did not include the sale in his final financial disclosure declaration dated December 23, 2003, and instead listed the current gross fair market value of the dental practices at \$390,000, less \$48,000 in business related debt, for a net equity of \$342,000. The trial court further found that Marc did not obtain April's consent for the sale of his dental practices, or a court order permitting the sale. Finally, the trial court found that Marc "intentionally misrepresented and concealed a material fact, namely, he sold the dental practices for \$108,977 more

than the equity disclosed to [April] causing her to suffer financial detriment (Family Code section 1101(h)).”

Marc does not challenge the above noted facts. Instead he contends that he and April stipulated that the dental practices would be valued as of the date of separation, and as a result of that stipulation, April did not have a legal right to any increase in the value of his dental practices after that date, which in turn rendered all information about an increase in value immaterial and irrelevant. Marc’s argument is based on a wholly incorrect characterization of the purported stipulation.

The stipulation Marc’s entire argument depends on was filed in January 2003, when the parties, or at least their attorneys, anticipated they would go to trial on the unresolved issues. The document is entitled “Stipulation for Bifurcation of Valuation Date and Order,” and provides that “pursuant to Family Code section 2552(b) and California Rules of Court, Rule 1242.5, the valuation date of [Marc’s] dental practice is the date of separation, November 19, 1999. In place of the date of trial [*sic*].” Section 2552 states in pertinent part that for purposes of dividing the community estate in a dissolution of marriage or legal separation, “the court shall value the assets and liabilities as near as practicable to the time of trial,” except as provided in subdivision (b). Subdivision (b) of section 2552 allows the court to value all or part of the assets and

liabilities at a date “after separation and before trial.”⁵ In short, the stipulation was pertinent only if the parties went to trial on the unresolved issues.

Marc and April did not go to trial. Instead they entered into the MSA which rendered a trial, and thus the stipulation, irrelevant. Significantly, and contrary to Marc’s suggestion, neither the stipulation nor the MSA specifies a value for his dental practices, or any other asset or liability covered by the MSA, presumably because he and April could not agree on those specific values. Instead, Marc and April reached a global settlement, embodied in the MSA, pursuant to which Marc paid April the previously mentioned equalizing payment of \$100,000.

As previously noted, in challenging the trial court’s order granting April’s motion, Marc does not dispute the facts or the law. Instead he relies entirely on his mistaken view regarding the significance of the stipulation, i.e., that it rendered irrelevant and thus immaterial any post-separation change in the value of his dental practices, which in turn absolved him of any responsibility to disclose any information about the dental practices. Because Marc’s view is wrong and the facts and law are undisputed, we must affirm the trial court’s order.

According to the undisputed facts the dental practices were community assets; Marc sold those assets in December 2003 without April’s consent or a court order authorizing the sale; Marc did not disclose that he sold the dental practices or the price he

⁵ The California Rule of Court referred to in the stipulation also pertained to alternate valuation dates, and has since been repealed. The current version is rule 5.126 of the California Rules of Court.

received for the sale; Marc filed a financial declaration signed under penalty of perjury only days after he sold the dental practices in which he listed their value at less than what he had just received in the sale; he and April did not sign the MSA until March 2004, three months after Marc's sale of the dental practices; and the judgment in this case was not entered until April 2004.

Marc's contrary view notwithstanding, the foregoing facts support the trial court's finding that Marc violated the mutual restraining orders imposed under Family Code section 2040, subdivision (a); breached the fiduciary duties imposed under Family Code sections 1100,⁶ 2102,⁷ and 721⁸; and in doing so he was guilty of fraud as defined in

⁶ Section 1100, subdivision (d), provides in pertinent part that, "[A] spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest. Primary management and control means that the managing spouse may act alone in all transactions but shall give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business . . . whether or not title to that property is held in the name of only one spouse. . . . [¶] Remedies for the failure by a managing spouse to give prior written notice as required by this subdivision are only as specified in Section 1101."

⁷ Section 2102, subdivision (a) provides in pertinent part that, "From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the assets and liabilities of the other party, including, but not limited to, the following activities: [¶] (1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses including an immediate, full, and accurate update or augmentation to the extent there have been any material changes. [¶] (2) The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the

[footnote continued on next page]

Civil Code section 3294.⁹ Family Code section 1101, subdivision (h) provides that, “Remedies for the breach of the fiduciary duty by one spouse, as set forth in Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.”

Simply stated, the evidence supports the trial court’s award to April under section 1101, subdivision (h) of \$108,977, a sum that represents the difference between Marc’s valuation of his dental practices in the last financial declaration he prepared in this matter

[footnote continued from previous page]

ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive.”

⁸ Section 721, subdivision (b) states in pertinent part that, “[I]n transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners . . . including, but not limited to, the following: [¶] . . . [¶] (3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property.”

⁹ Civil Code section 3294, subdivision (a) authorizes a court to award exemplary damages when, “[i]n an action for the breach of an obligation not arising from contract,” a defendant has been guilty of oppression, fraud, or malice. Subdivision (c)(3) of section 3294 defines fraud as “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”

on December 23, 2003, (\$342,000), and the amount he received for the sale of his dental practices pursuant to the contracts he had signed only eight days earlier (\$450,977).¹⁰

B. Attorneys' Fees Issue

The trial court granted April's request for attorneys' fees and costs in connection with her motion to recover the proceeds from the sale of the dental practices and awarded her \$15,000. Marc contends there is no statutory authority for the fee award and in any event the amount of the award is not supported by the evidence. We agree that the amount of the award is not supported by the evidence.

Section 1101, subdivision (h), pursuant to which the trial court awarded April 100 percent of the proceeds from Marc's undisclosed sale of the dental practices, does not include a provision regarding attorneys' fees. In contrast, subdivision (g) of section 1101, which applies when the breach of fiduciary duty does not involve fraud and permits an award of 50 percent of the omitted asset to the other spouse, expressly authorizes an attorneys' fee award. Because subdivision (h) of section 1101 states that the remedies "shall include, but not be limited to" recovery of 100 percent of the undisclosed asset, we conclude that a trial court has discretion to award attorneys' fees under that section. (See *In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 42 [“The clear import of the language

¹⁰ To the extent Marc contends that the trial court should have reduced the award to April by the amount of the separate property funds he used to “pay-down debt on the Indio practice,” we must conclude that Marc failed to present any evidence in the trial court, or at least fails to cite any evidence to this court on appeal, to establish the amount of money in question.

in subdivision (h) is that an award of attorney fees is discretionary, over and above the mandatory award of the entire asset at issue.”].)

The amount of an attorneys’ fee award is also a matter within the trial court’s discretion. (*In re Marriage of Munguia* (1983) 146 Cal.App.3d 853, 862.) On appeal, we will not disturb that award unless “considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]” (*Id.* at p. 863, italics omitted.)

The trial court’s attorneys’ fee award is not supported by the evidence presented in this case. April’s attorney submitted various declarations documenting the work performed in connection with April’s omitted asset motion and establishing the hourly rate at which the attorney bills for his time. The attorney’s final declaration, dated April 5, 2007, attributes 20.05 hours to work performed on April’s motion, for a total fee of \$9,327. In its minute order, the trial court directed Marc to pay April’s attorney the sum of \$15,000. The evidence presented in the trial court does not support an attorneys’ fee award in that amount.

In arguing otherwise April posits that the trial court might have included an amount in the fee award to compensate for work to be performed in the future and therefore not included in counsel’s declaration. April’s argument is based on speculation, not evidence. If her attorney anticipated performing additional work on the matter he should have included in his declaration an explanation of the anticipated additional work along with an estimate of the additional time, and thus the anticipated additional fees

April would incur. He did not do that, an omission that suggests he did not anticipate spending any significant amount of additional time on the matter.¹¹ But even if we were to accept April's premise, it does not justify the additional \$5,700 at issue here, an amount that represents more than 14 hours of attorney time billed at counsel's then effective hourly rate of \$400.

We also reject April's suggestion that the trial court was not bound by the evidence. In particular April quotes *In re Marriage of Jovel* (1996) 49 Cal.App.4th 575, for the proposition that the trial court was not required to calculate the award of attorneys' fees according "to a mathematical computation of hours times hourly rates." April's reliance on *In re Marriage of Jovel* is misplaced. The issue in that case was whether the trial court erred by awarding only a portion of the attorneys' fees requested and supported by the evidence. (*Id.* at p. 587.) The issue here is whether a trial court may award attorneys' fees in an amount greater than that supported by the evidence. April does not cite any authority to support such an award.

Accordingly, we conclude the trial court abused its discretion by awarding April attorneys' fees in an amount greater than that supported by the evidence. The evidence supports an attorneys' fee award of \$9,327, plus costs. Therefore, we will reverse the

¹¹ As it turns out, counsel did spend additional time on this matter in an effort to obtain clarification of the trial court's various rulings. However, at the time the trial court made the \$15,000 attorneys' fees award, no additional hearings or orders were anticipated.

attorneys' fee award, and will remand this matter to the trial court with directions to recalculate that award.

2.

APRIL'S APPEAL

April challenges the trial court's order reducing Marc's monthly child support obligation from \$2,400, the amount he agreed to in the MSA, to \$1,400, the amount purportedly warranted under the uniform child support guidelines. April contends among other things that Marc should be estopped from denying his income as represented in the MSA because in March 2004 when he signed that agreement he knew his monthly income was less than \$21,000 to \$25,000 recited in the agreement, and presumably he did not disclose the real amount in order to conceal the fact that he had sold his dental practices. We agree with April.

Our conclusion is guided by *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009 (*Laudeman*), which holds that when as here the parties knowingly stipulate to child support in an amount above the statewide uniform child support guideline, a court does not have jurisdiction to reduce child support absent a showing of changed circumstances. (*Id.* at p. 1015.) Marc attempted to show, and the trial court found, changed circumstances, namely April's increased monthly income and Marc's purportedly reduced monthly income.

The MSA states that Marc's monthly income for purposes of child support was between \$21,000 and \$25,000, and warranted the agreed-upon monthly child support of

\$2,400. At the time Marc signed the MSA and submitted his final financial disclosure declaration, he knew his income was not as represented in either document because he no longer owned the dental practices. The trial court included a finding in its statement of decision that Marc's monthly income was not as represented in the MSA and had not changed—it was \$10,000 per month plus a periodic bonus that averaged \$2,500 per month on April 22, 2004, when the judgment based on the MSA was entered, and it “remained unchanged as of April 25, 2007,” when the trial court issued its order on Marc's order to show cause. Inexplicably the trial court then relied on that previously undisclosed income to calculate Marc's monthly child support obligation.

Marc failed to disclose his true income and instead allowed judgment to be entered based on his income as represented in the MSA. Whether Marc's action was motivated by deceit or stupidity is irrelevant.¹² April presumably relied on the agreed-upon monthly child support of \$2,400 in agreeing to and negotiating other terms of the MSA. Because Marc concealed his true monthly income he may not now profit from that conduct. “No one can take advantage of his own wrong.” (Civ. Code, § 3517.) April's increased income from her employment as a teacher is the only changed circumstance the trial court should have considered in calculating Marc's monthly child support obligation.

¹² Marc claims he was not being deceitful and that his income technically was as represented in the December 2003 financial declaration because at the time he signed that declaration he was not yet actually employed by Pinewood, the purchaser of his dental practice. Marc makes a similar claim that relies on the previously mentioned version of the MSA signed in January 2004. Marc does not dispute that he had sold his dental practices and knew that within days of submitting his financial declaration he would be an employee earning less money than represented in the declaration.

DISPOSITION

The order on April's motion under section 2556 to adjudicate an omitted asset is affirmed as to the award of \$108,977 but is reversed as to the attorneys' fee award, and is remanded to the trial court to recalculate that award in accordance with the evidence presented.

The order modifying child support is reversed and remanded to the trial court for recalculation based solely on April's increased income.

April is awarded her costs on appeal.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.
/s/ King
J.